Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
Creation of A Low Power Radio Service	)	MM Docket No. 99-25

COMMENTS OF COX RADIO, INC.

Cox Radio, Inc. ("Cox"), by its attorneys, hereby submits these Comments in response to the Commission's *Second Further Notice* in the above-captioned rulemaking proceeding.[1] In the *Second Further Notice* the Commission proposes to adopt rules that would essentially afford low power FM radio ("LPFM") licensees co-equal status with full-power stations, contrary to Congressional intent and the public policy considerations that underlie the history of the LPFM service. While Cox appreciates the targeted localism LPFM stations can provide, it is not in the public interest for the Commission to adopt rules that hinder full power station upgrades and service changes. However well intentioned, the Commission should not adopt its proposals on Section 73.807 second-adjacent channel waivers or LPFM station displacement.

I. Introduction

Cox currently owns, operates or provides sales and marketing services to sixty-seven FM stations and thirteen AM stations throughout the United States. As the owner of numerous full service stations, Cox has a keen interest in preventing harmful interference to existing broadcast service in its communities and to its ability to deliver full power radio service to the public. Cox

[1] Creation of A Low Power Radio Service, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 22 FCC Rcd 21912 (2007) ("*Second Further Notice*").

has, therefore, participated in the Commission's prior review of LPFM policies, urging the Commission to maintain full power station interference protection from LPFMs.[2]

In the Order that accompanies the *Second Further Notice,* the Commission adopted three policies to address a perceived problem that applications for new or upgraded full power facilities may displace LPFMs.[3] First, the Commission made Section 73.809 of its rules inapplicable to second-adjacent channel interference.[4] Second, it adopted interim procedures for LPFMs at risk of displacement under which an LPFM can request a temporary waiver of the short-spacing rules for second-adjacent channel operations.[5] Third, the Commission adopted a "processing policy" for evaluating community of license modification proposals.[6] The policy includes a presumption that dismissing an "encroaching" community of license modification application from a full power station is in the public interest if there is no alternative channel available for a threatened LPFM that can demonstrate it has regularly provided at least eight hours per day of locally originated programming.[7]

In the *Second Further Notice*, the Commission requests comment on its proposed policies regarding second-adjacent channel waivers and community of license modifications.[8] The Commission also requests comment on the obligation of full-power applicants to assist LPFMs

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[2] *See* Comments of Cox Radio in MM Docket No. 99-25 (filed Aug. 22, 2005); Reply Comments of Cox Radio, Inc. in MM Docket No. 99-25 (filed Sept. 21, 2005).

[3] *Second Further Notice* at ¶ 60.

[4] *Id.* at ¶ 63.

[5] *Id.* at ¶¶ 64-67.

[6] *Id.* at ¶¶ 68-71.

[7] *Id.* at ¶ 68.

[8] *Id.* at ¶¶ 74-75.

that receive interference after full-power station upgrades.[9] Although Cox is sympathetic to LPFM operators, Cox opposes any proposal allowing *secondary* LPFM services to impinge on the operation of *primary* full-power stations.

Primary full-power stations provide tremendous service to their local communities, and the Commission should not adopt policies that would hinder their abilities to serve their audiences. On any particular day, Cox's full-power radio stations provide hours of local news and public affairs programming. Cox's stations are dedicated to their local communities. For example, for the last fifteen years WSB(AM) has funded the Clark Howard Consumer Action Center, which provides free consumer advice to anyone who calls the Consumer Action Center. WSB(AM) also dedicates thirty-six hours of airtime for its annual Carathon, which benefits the nonprofit pediatric hospital Children's Healthcare of Atlanta. Moreover, unlike LPFM stations, Cox's full-power stations play critical roles during emergencies. When Hurricane Charley hit Florida's Gulf Coast in 2004, Cox's Tampa stations, by prearrangement, activated inland studios collocated with local Emergency Operations Centers, successfully allowing government officials to be connected directly with radio broadcasters before, during, and after the storm. On September 11, 2001, Cox's Stamford and Norwalk, Connecticut stations, which serve areas are just outside of New York City, provided wall-to-wall news coverage and important news updates to residents in southern Connecticut.

[9] *Id.* at ¶ 76.

II. LPFMs Were Established as a Secondary Service and the Commission Cannot Now Afford Them Primary Status Without Establishing Good Cause.

Both the proposed second-adjacent waiver policy and the Commission's "licensing presumption" to protect existing LPFM stations from displacement by new or upgrading full power stations represent radical departures from longstanding spectrum policy. The Commission established LPFM as a secondary service because (i) LPFM stations have a much smaller service area than full-power stations and (ii) LPFM stations do not have to abide by the many of the public interest regulations applicable to full-service stations, such as the main studio and public inspection file rules.[10] The Commission reaffirmed its position as recently as 2005.[11] Now, without imposing any of the burdens of being a full-power station, the Commission proposes to provide many LPFM operators with the interference protection benefits that full-power facilities enjoy. The Commission's "licensing presumption" would grant co-equal, primary status to certain LPFM stations. It also would prevent some full-power FM stations from serving new communities and providing upgraded service to new, larger audiences.

The Commission has long interpreted its statutory command to distribute radio licenses in "a fair, efficient, and equitable" manner as justifying primary status for full-power broadcast stations and secondary status for low power services. [12] Full-power broadcast stations are more

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[10] *See* Creation of Low Power Radio Service, *Report and Order*, 15 FCC Rcd 2205, ¶ 65 (2000) ("*2000 LPFM Order*").

[11] Creation of a Low Power Radio Service, *Second Order on Reconsideration and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 6763 ¶ 38 (2005) (rejecting a proposal that "effectively would provide primary status to LPFM stations with respect to subsequently filed applications for new or modified full service facilities").

[12] 47 U.S.C. 307(b)

efficient and better serve the public interest than low-power facilities because full-power stations "make more efficient use of the spectrum than . . . [low-power stations] in that the ratio of coverage to interference area is much larger for full-service stations than for low-power [stations]."[13] In 1978, the Commission stopped accepting applications for new low power Class D noncommercial FM stations and required existing facilities to upgrade or move to commercial channels because the Class D stations were "impeding the licensing of more efficient Class B and C stations."[14] In 1990, after an extensive review of FM translator operations, the Commission similarly declined to authorize the operation of FM translators on a primary basis.[15] The Commission consistently has determined that efficiency requires a maximized coverage to interference ratio and that the existing interference protection standards effectively provide for spectrum efficiency.

The Commission cannot suddenly reverse thirty years of precedent and grant co-equal, primary status for certain LPFM stations without building a significant factual record that justifies this abrupt departure from prior spectrum policy. Whenever "an agency chang[es] its course, [it] must supply a reasoned analysis."[16] If the Commission decides to change a

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[13] Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, *Notice of Inquiry*, 3 FCC Rcd 3664 ¶ 32 (1988).

[14] *Id.*

[15] Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations, *Report and Order*, 5 FCC Rcd 7212, 7213 (1990).

[16] Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57 (1983). Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002) ("The Commission may, of course, change its mind but it must explain why it is reasonable to do so."); United Mun. Distrib's Group v. FERC, 732 F.2d 202, 210 (D.C. Cir. 1984) ("It is, of course, elementary that an agency must conform to its prior practice and decisions or explain the reason for its departure from such precedent.").

longstanding policy, it must do so with a detailed and reasoned analysis. It cannot casually ignore three decades of sound spectrum management.[17]

The record in this proceeding does not support the changes the Commission proposes. The Commission attempts to justify its proposals by claiming that "[c]ircumstances have changed considerably since we last considered the issue of protection rights for LPFM stations from subsequently authorized full-service stations."[18] Specifically, the Commission cites the lifting of the filing freeze for FM community of license modification proposals and the implementation of the new streamlined licensing procedures, which resulted in a "one-time flurry" of filing activity.[19] But a *one-time* flurry – which has now come and gone – cannot justify permanent changes to spectrum policy. Moreover, the streamlined licensing procedures actually make it less likely that an LPFM station will be displaced in the future because the Commission's four-station contingent application rule prevents many community of license proposals that would have been possible under the old rulemaking procedures.[20]

The Commission's treatment of low power television offers a useful contrast. LPTV stations faced serious threats of massive disruption when the Commission authorized the DTV table of allotments, which nearly doubled the amount of full power television stations on the air

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[17] Greater Boston Int'l Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (holding that the Commission must provide "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.").

[18] *Second Further Notice*, at ¶ 63.

[19] *See id.*

[20] *See* 47 C.F.R. § 73.3517(e).

at the time. Yet, the Commission maintained LPTV's secondary status.[21] Only after Congress passed the Community Broadcasters Protection Act of 1999 did the Commission create some measures of protection for a small subset of LPTV stations.[22] But the Community Broadcasters Protection Act includes an important tradeoff: to retain Class A status, an LPTV station must continuously abide by the many public interest and reporting requirements of full-service television stations.[23]

For the Commission to change its established interference protection policies for LPFM, it must have a similar Congressional directive – which it does not – or concrete evidence in the record that LPFM stations, on average, provide *better* public service than full power stations. When measured by any objective standard, however, LPFM stations cannot show they should receive the proposed virtual co-equal treatment with full power stations. LPFM stations do not have the same public interest obligations as full-service broadcasters and by definition cannot serve as large an audience. The Commission has not compiled the necessary record to demonstrate that the level of service provided by LPFM stations justifies increased protections.[24]

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[21] *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum, Opinion & Order on Reconsideration of the Sixth Report & Order*, 13 FCC Rcd 7418, ¶ 105 (1998) ("We disagree with the petitioners that the fact that we have significantly increased the use of the TV spectrum by primary stations warrants modifying the secondary status of these stations.").

[22] *See* Establishment of a Class A Television Service, *Report & Order*, 15 FCC Rcd 6355 (2000).

[23] *See id.* at ¶ 23.

[24] Nevertheless, if the Commission adopts its proposed "licensing presumption," the presumption should only apply to full-power FM applications filed on or after November 27, 2007, which is the adoption date of the *Second Further Notice*. It would be inequitable to apply the presumption to FM applications filed prior to that date because applicants have expended significant resources investigating and preparing an application to change a station's community of license. *Cf.* Review of the Commission's Regulations Governing Television Broadcasting,

continued...

III. The 2001 DC Appropriations Act Forbids the Commission from Lessening Its Second-Adjacent Spacing Standards.

Under the 2001 DC Appropriations Act ("Act"),[25] the Commission may not waive its spacing rules, including those for second-adjacent channels. In the pertinent part, the Act states:

> (1) The Federal Communications Commission shall modify the rules authorizing the operation of low-power FM radio stations . . . to—
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> (A) prescribe minimum distance separations for third adjacent channels (as well as for co-channels and first- and second-adjacent channels); and
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> . . .
>
> (2) The Federal Communications Commission may not—
>
> (A) eliminate or reduce the minimum distance separations for third-adjacent channels required by paragraph (1)(A)
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> . . . .

The Commission apparently believes that the Act only bars waiver of the third-adjacent channel spacing rules.[26] But the Commission "must interpret the statute to avoid absurd results and further congressional intent."[27] When a statute is ambiguous, the Commission must provide "a reasoned analysis" and read the words of the statute "in their context and with a view to their place in the overall statutory scheme."[28] It has not followed those commands here.

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Report & Order, 14 FCC Rcd 12903, ¶ 144 (1999) (grandfathering local marketing agreements entered into prior to the adoption of a notice of proposed rulemaking because forcing divestiture of these arrangements would impose an unfair hardship on parties that expended significant resources prior to receiving notice that the Commission would change its rules).

[25] Pub. L. No. 106-552, § 632(a), 114 Stat. 2762, 27620A-111 (2000).

[26] *Second Further Notice* at ¶ 66 & n.171; *see also Second Further Notice* at n.178 ("Third-adjacent channel waiver short-spacings appear to be explicitly barred under the 2001 DC Appropriations Act.").

[27] *See* Teva Pharms., USA, Inc. v. FDA, 182 F.3d 1003, 1011 (D.C. Cir. 1999).

[28] *See* Sec'y of Labor, Mine Safety & Health Admin. v. Nat'l Cement Co. of Cal., Inc., 494 F.3d 1066, 1076 (D.C. Cir. 2007) (quoting Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 944-45 (D.C. Cir. 2004)).

The Commission's interpretation is illogical. Under its interpretation, the Commission provides greater interference protections for third-adjacent stations than against the more harmful interference to co-channel, first-, or second-adjacent stations. Moreover, the Act specifically requires the Commission to create minimum distance separations for second-adjacent channels. It makes no sense for Congress to require the Commission to establish second-adjacent spacing rules only to allow the Commission to eviscerate the rules with a generous waiver standard. Given that the Commission's current interpretation "compel[s] an odd result," the Commission should examine the Act's legislative history to clarify Congress's intent.[29]

That legislative history demonstrates that the Act's apparent emphasis on third-adjacent channels is a mere quirk. Congress passed the Act in response to the Commission's decision to eliminate third-adjacent protections for full-power FM stations.[30] Congress never contemplated that the Commission would later consider eliminating second-adjacent protections. Indeed, in its Committee Report concerning the relevant provision, the House Commerce Committee left no doubt about its intent to preserve the interference standards for full-power stations.[31] The Committee stated that the provision "requires Congressional authority for the FCC to eliminate or reduce *any* interference standards on the radio dial" and that "LPFM stations which are authorized under this section, but cause interference to new or modified facilities of a full power station, would be required to modify their facilities or cease operations."[32]

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[29] *See* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989) (quoting Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989)).

[30] *See 2000 LPFM Order* at ¶ 93.

[31] *See* H.R. Rep. No. 106-564 (2000).

[32] *Id.* at 3, 8 (emphasis added).

Regardless of any good intentions the Commission might harbor about advancing localism by protecting LPFMs, the Commission cannot do so in the manner proposed without violating Congressional intent.[33] The Commission may not reduce second-adjacent spacing standards, whether by rule or waiver, without obtaining Congressional approval first.

VI. Conclusion

Cox urges the Commission to reject a second-adjacent channel waiver policy and put to rest any suggestion that an existing LPFM may block an application for a new or expanded full power station. To "maintain the integrity of the FM service,"[34] the Commission should rigorously maintain the distinction between primary and secondary services.

Respectfully submitted,

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April 7, 2008

[33] Cox notes some parties have proposed moving LPFM stations to television Channels 5 and 6. *See, e.g.*, REC Networks, Notice of Ex-parte Presentation in MM Docket No. 99-25 (filed Feb. 27, 2008). Cox supports creative solutions to the LPFM displacement issue as long as a solution does not produce interference for other radio or television broadcasters.

[34] *See 2005 LPFM Order* at ¶ 1.